that no CLEC avails itself of our benchmark scheme to *increase* its access rates,[102] and we adopt a separate benchmark for certain firms operating in rural areas.[103]

46. In determining the initial level for the safe harbor rates which may be imposed by tariff, we use current CLEC rates as a starting point for analysis because, as noted above, we lack an established framework for translating CLEC costs into access rates.[104] Current CLEC rates provide a useful analytical tool since, in most instances, they were set unilaterally by the individual CLECs. Thus, there should be no concern that the current rates provide an inadequate return to the carrier that tariffed them. Additionally, we note that precedent exists for setting rates by some means other than reviewing the costs of each individual industry participant.[105]

47. Our understanding of current CLEC access rates is based on several sources. We have anecdotal information about a few CLECs' access charges through the complaint proceedings initiated at the Commission. At the time it filed its complaint against AT&T, MGC was charging slightly in excess of 8.5 cents per minute.[106] Similarly, in *U.S. TelePacific v. AT&T*[107] the CLEC was charging approximately 7.45 cents per minute for switched access. In addition, AT&T, WorldCom and Sprint submitted information regarding what they have been charged for CLEC access service and how many minutes of service this represents. The Association for Local Telecommunications Services (ALTS) also filed summary statistics on CLEC access rates based on a survey of its members. Each of these data sources has its limitations[108]; nonetheless, we believe that the information submitted by AT&T, WorldCom, and

[102] *See infra* paragraph 57.

[103] *See infra* paragraphs 64-87.

[104] Moreover, CLEC commenters have not submitted, in this proceeding, any data to justify their rates. Rather, these commenters have relied upon generalized assertions that their rates are justified by higher costs.

[105] In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968), the Court noted that "administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties." Recognizing the need for "more expeditious administrative methods," the Court further stated that "rate-making agencies are not bound to the service of any single regulatory formula; they are permitted . . . 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Id.* at 776-77 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). *See also FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (agency is not required "to adhere rigidly to a cost-based determination of rates, much less to one that bases each producer's rates on his own costs" (internal quotation omitted)); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984); *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 309 (1963) ("Court has never held that the individual company cost-of-service method is a *sine qua non*" of rate regulation); *American Public Gas Association v. Federal Power Commission*, 576 F.2d 1016, 1037 (D.C. Cir. 1977) (approving economic modeling as basis for ratemaking). As noted elsewhere, we do not set rates in this order. We only limit the rates that CLECs may impose through the tariff system.

[106] *MGC v. AT&T*, 14 FCC Rcd at 11647, n.4.

[107] File No. EB-00-MD-010.

[108] For example, Sprint does not provide minute-of-use data for those CLECs that charge less than or equal to the corresponding ILEC rate. Similarly, AT&T and WorldCom appear not to have submitted *any* data for CLECs that charge less than or equal to the corresponding ILEC rate. Finally, the estimates submitted by ALTS are of (continued....)

asserts that over 80% of the CLECs from which it receives access bills charge rates at or below those of the competing ILEC.[113] Accordingly, setting the initial benchmark toward the lower end of the range appears to be justified. Based on our review of the universe and concentration of tariffed access rates being charged to these three IXCs, we conclude that – again, subject to certain exceptions that we discuss below – our safe harbor for CLEC tariffed access rates will begin at 2.5 cents. This rate is within the current range of rates, but represents an appreciable reduction in the tariffed rate for many CLECs.

50. We draw additional support for this initial benchmark level from a consensus solution submitted by parties on both sides of the present dispute. In comments to the *Safe Harbor Public Notice*, the Association for Local Telecommunications Services (ALTS) filed a proposed resolution, negotiated with WorldCom, suggesting, in relevant part, that a benchmark of 2.5 cents per minute for CLEC tariffed access rates would be a reasonable one in at least some markets.[114] WorldCom described the parties' proposal as a "good faith attempt to reach a compromise among competing interests" and stated that it was "consistent with sound public policy and merits serious consideration."[115] ALTS's web site states that it represents over "200 companies that build, own, and operate" competitive, facilities-based networks.[116] We note that many of the CLECs participating in this proceeding are listed as members on ALTS's web site. Accordingly, it appears that this rate is acceptable to a substantial number of CLECs, although it represents a significant reduction in access rates. While ALTS suggests a different timeframe for reducing the safe harbor limit over time, we find its support for the initial rate to be a fair indicator of its reasonableness. Similarly, we note that this rate is significantly below the average tariffed CLEC access rate, as reported by the IXC commenters. We conclude that this joint proposal offers a workable starting point for our benchmark, when combined with the rule that will prevent any CLEC from *increasing* its rates to the benchmark level and from entering new markets above the prevailing ILEC rate.[117]

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composite rates for these carriers, let alone confirm Sprint's contention that these carriers charge less than or equal to the ILEC rate.

[113] *See* AT&T Safe Harbor Comments at 7.

[114] ALTS Safe Harbor Comments at 4. *See also* ASCENT Safe Harbor Comments at 5 (ALTS proposal has "significant merit" and "may well form a viable basis for Commission action").

[115] WorldCom Safe Harbor Comments at 5. We note that the only portion of the ALTS proposal with which WorldCom specifically disagreed in its comments to the *Safe Harbor Public Notice* was the implementation schedule. *See id.* n.5. It is also noteworthy that ALTS and WorldCom personnel jointly met with Commission staff to discuss their proposal. *See* October 30, 2000 letter of Jonathan Canis, counsel for ALTS, to Magalie Salas, Secretary, FCC, CC Dkt. No. 96-262. Subsequently, WorldCom has also expressed support for a lower benchmark figure proposed by AT&T and NewSouth Communications. *See* March 22, 2001 letter of Donna Sorgi, WorldCom, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[116] Association for Local Telecommunications Services, http://www.alts.org/frames/aboutalts.htm (visited Mar. 2, 2001).

[117] *See infra* paragraph 57. As additional support for the benchmark framework and the transition mechanism, if not the precise figure, that we adopt, we note that NewSouth Communications and AT&T have both recently expressed support for an initial benchmark figure of 1.2 cents per minute, transitioning to the ILEC rate within one year. *See* March 15, 2001 of Jake Jennings, NewSouth Communications, to Dorothy Attwood, Chief, Common (continued....)

51. On the effective date of the rules we promulgate today, CLECs will be permitted (subject to a rural exemption discussed below) to tariff their access rates, for those areas where they have previously offered service,[118] at either the benchmark of 2.5 cents per minute, or the rate of the corresponding incumbent carrier in the study area of the relevant end-user customer, whichever is higher. By permitting CLECs to tariff their rates up to the level of the carrier with which they compete, we recognize that some competitive carriers may operate in areas served by incumbent LECs – often rural ones – that our rules already permit to charge access rates above those of the large price-cap ILECs.[119] If operation in these areas justifies higher access rates for the regulated incumbents, we conclude that it justifies equivalent rates for any competitor operating in the area.

52. Over time, our benchmark figure will decrease until it reaches the rate of the ILEC with which a CLEC competes. One year after the effective date of these rules, the benchmark rate will drop from 2.5 to 1.8 cents per minute, or the ILEC rate, whichever is higher. On the second anniversary of the rules' effective date, the rate will drop to 1.2 cents per minute, or the ILEC rate, whichever is higher.[120] Finally, three years after the rules become effective, the benchmark figure will drop to the switched access rate of the competing ILEC. It will remain at that level through the rule's fourth year. We conclude that such a transition period is appropriate because, as discussed above, we are concerned about the effects of a flash-cut to the ILEC rate.[121] Instead, we are persuaded that CLECs should be allowed an opportunity to adapt to the less tariff-dependent regulatory environment to which we move with this order. We adopt a three-year transition to the ILEC rate both because it appears to allow sufficient time for CLECs to adjust their business models and because it is consistent with several other Commission reform initiatives relating to inter-carrier compensation that are currently under way.[122]

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Carrier Bureau, CC Dkt. No. 96-262; March 16, 2001 letter of Patrick Merrick, AT&T, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

[118] *See infra* paragraph 58.

[119] *See Multi-Association Group (MAG) Plan For Regulation of Interstate Services of Non-Price Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Dkt. No. 00-256, Notice of Proposed Rulemaking, FCC 00-448, ¶ 5 (rel. Jan. 5, 2001).

[120] We note that this is the level that AT&T and NewSouth propose as the starting point for the benchmark. *See supra* note 117.

[121] *See supra* paragraph 37.

[122] We have chosen a three-year ramp-down period in the recently adopted order governing reciprocal compensation payments for traffic bound for internet service providers. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Dkt No. 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001). The transition period in this item should also bring CLEC rates down to the ILEC rate one year before ILEC rates are set to be reexamined in the *CALLS Order*. *See CALLS Order*, 15 FCC Rcd at 12977, ¶ 35. Lastly, the ramp-down period that we adopt today is consistent with the likely timeframe for the more far-reaching and general examination of inter-carrier compensation mechanisms that we initiated through another recent notice of proposed rulemaking. *See Intercarrier Compensation NPRM*, FCC 01-132 .

53. In order further to ease CLEC transition to the market paradigm that we adopt today, our rules permit CLECs to tariff, through the fourth year of the rule's effectiveness, a rate equivalent to the benchmark level established three years after the effective date of this order. As previously noted, the Commission is conducting a more general examination of inter-carrier compensation by way of a notice of proposed rulemaking. One of the options under serious consideration in that proceeding is a move to a bill-and-keep regime, under which carriers would recover their costs from end users, rather than from interconnecting carriers. Even if we choose that route in the inter-carrier compensation proceeding, the rules we adopt today would not mandate bill-and-keep for CLEC access tariffs until a full four years after the effective date of this order.

54. By moving CLEC tariffs to the "rate of the competing ILEC" we do not intend to restrict CLECs to tariffing solely the per-minute rate that a particular ILEC charges for its switched, interstate access service. As WorldCom notes, CLECs should not be "deprived of revenue streams available to the incumbent monopolists with which they compete."[123] Rather, by moving CLEC access tariffs to the competing ILEC rate, we intend to permit CLECs to receive revenues equivalent to those the ILECs receive *from IXCs*, whether they are expressed as per-minute or flat-rate charges. For example, CLECs shall be permitted to set their tariffed rates so that they receive revenues equivalent to those that the ILECs receive through the presubscribed interexchange carrier charge (PICC), to the extent that it survives in the wake of our *CALLS Order*.[124] This does not entitle CLECs to build into their tariffed per-minute access rates a component representing the subscriber line charge (SLC) that ILECs impose on their end users, or any other charges that ILECs recover from parties other than the IXCs to which they provide access service.

55. A number of CLEC commenters urge the Commission not to set the benchmark at "the ILEC rate" because they claim that CLECs structure their service offerings differently than ILECs.[125] We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates. Thus, in contrast to our regulation of incumbent LECs, our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark. Rather it is based on a per-minute cap for all interstate switched access service charges. In this regard, there are certain basic services that make up interstate switched access service offered by most carriers. Switched access service typically entails: (1) a connection between the caller and the local switch, (2) a connection between the LEC switch and the serving wire center (often referred to as "interoffice transport"), and (3) an entrance facility which connects the serving wire center and the long distance company's point of presence. Using traditional ILEC nomenclature, it appears that most CLECs

[123] WorldCom Safe Harbor Comments at 2.

[124] In the *CALLS Order*, we eliminated the PICC for residential and single-line business users. *See CALLS Order* 15 FCC Rcd at 12991-13004, ¶¶76-104. For multi-line business users, we initially set it at $4.31 per line, subject to additional reductions that will ultimately eliminate it as well. *See id.* at 13004-07, ¶¶ 105-112.

[125] CLECs contend that they are using different technologies, different network architectures and different pricing plans that make comparison between CLEC and ILEC rates difficult. *See* BayRing Safe Harbor Comments at 3; Focal & Winstar Safe Harbor Reply Comments at 8.

seek compensation for the same basic elements, however precisely named: (1) common line charges; (2) local switching; and (3) transport.[126] The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark. In addition, by permitting CLECs to decide whether to tariff within the safe harbor or to negotiate terms for their services, we allow CLECs additional flexibility in setting their rates and the amount that they receive for their access services.

56. We will apply the benchmark for both originating and terminating access charges. That is, it will apply to tariffs for both categories of service, including to toll-free, 8YY traffic, and will decline toward the rate of the competing ILEC for each category of service. We note, however, that shortly before the issuance of this order, AT&T raised questions regarding the application of our benchmark to originating 8YY traffic generated by CLEC customers.[127] Because these issues arose so late in the proceeding, and because of the sparse record on them, we decline to do as AT&T suggests and immediately detariff this category of CLEC services above the rate of the competing ILEC. Instead, in this order, we solicit comment on the issues AT&T has raised so that we may decide them on an adequately developed record.[128]

57. Our benchmark mechanism may create the possibility for carriers with lower rates to raise their rates to the benchmark. We seek to avoid this result, which could have the consequence of *increasing* the amount that IXCs pay for some CLECs' access service. This, in turn, would again allow these CLECs to shift a portion of their costs onto the long distance market generally. Accordingly, we further restrict the tariff benchmark that may be charged to a particular IXC by tariff to the lower of: (1) the 2.5 figure, declining as discussed above, or (2) the lowest rate that a CLEC has tariffed for access, during the 6 months immediately preceding the effective date of these rules. Any rate above this level (unless it is still below the competing ILEC's rate) will be conclusively deemed to be unreasonable in any proceeding challenging the rate.[129] By restricting CLECs to no more than the access rates they previously have chosen to

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[126] Thus, the safe harbor rate applies, but is not necessarily limited, to the following specific rate elements and their equivalents: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.

[127] *See* March 29, 2001 letter of Robert Quinn, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262; April 3, 2001 letter of Robert Quinn, AT&T, to Jeff Dygert, Assistant Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[128] *See infra* paragraphs 98-104. Late in this proceeding, Sprint argued that CLEC toll-free database query charges should also be subject to a tariff benchmark or should be detariffed above the rate of the competing ILEC. *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262. Sprint also mentioned this issue, but only in passing, in its comments to our *Safe Harbor Public Notice*. *See* Sprint Safe Harbor Reply Comments at 5. Given the dearth of record evidence on this issue, we decline at this time to impose by rule the limit on database query charges that Sprint proposes. We expect, however, that CLECs will not look to this category of tariffed charges to make up for access revenues that the benchmark system denies them.

[129] As set out in the regulations accompanying this order (*see* Appendix B), CLECs may thus tariff rates for switched access service that do not exceed the greater of:

A. The rate of the competing ILEC, or

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tariff, we minimize the opportunities for arbitrage that grow out of the rule we adopt today. Additionally, we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs.[130] Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide.

58. We also find that it is prudent to permit CLECs to tariff the benchmark rate for their access services only in the markets where they have operations that are actually serving end-user customers on the effective date of these rules. As we note above, the historical ability of CLECs to tariff access rates well above the prevailing ILEC rate may have contributed to economically inefficient market entry by certain CLECs. We intend the declining benchmark scheme to wean competitive carriers off of their dependence on tariffed, supra-ILEC access rates without the disruption of a flash-cut to the prevailing market rate. We therefore think it important to ensure that this transitional mechanism serves that purpose, rather than presenting CLECs with the opportunity to enter additional markets in a potentially inefficient manner through reliance on tariffed access rates above those of the competing ILEC. Accordingly, we restrict the availability of the transitional benchmark rate to those metropolitan statistical areas (MSAs) in which CLECs are actually serving end users on the effective date of these rules. In MSAs where they begin serving end users *after* the effective date of these rules, we permit CLECs to tariff rates only equivalent to those of the competing ILEC; they will have to achieve rates above this level by negotiation.

59. We recognize that the benchmark we adopt may dramatically reduce the tariffed access rates and revenues of many CLECs, particularly as the benchmark levels transition down over time. We conclude, however, that this reduction is warranted. As discussed above, we are concerned that numerous CLECs have been entering the access-service market at rates well above the prevailing rate charged by the incumbent.[131] Moreover, we are troubled by indications that CLECs are using these high access rates to shift a substantial portion of their start-up costs onto the long distance market and thus onto many subscribers who have chosen an access provider with lower rates. As the CLEC industry's market share continues to grow, this burden would only increase, absent some constraint on rates. We have noted that CLECs' ability to charge rates above the incumbent's appears to be due largely to the configuration of the access-

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B. The lower of:

1. The presumptively reasonable benchmark of 2.5 cents per minute, declining as described in paragraph 52 above, or

2. The CLEC's lowest tariffed rate during the six months preceding the effective date of these rules.

[130] *See, e.g., Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1301 (D.C. Cir. 1981) ("The *Sierra-Mobile* doctrine restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts.").

[131] We do not decide, in this order, whether those rates were reasonable at the time they were being charged. Rather, we conclude, on a prospective basis, that CLEC access rates will be deemed to be reasonable if they fall within the declining safe harbor that we have established.

service market and the geographical rate averaging required of the IXCs, both of which prevent market forces from disciplining rates. Our benchmark system will drive CLEC rates down toward the level charged by the ILECs, thereby bringing them toward the model of a competitive market, in which new entrants can successfully enter only at or below the prevailing market price. In so doing, the rules we adopt today reduce the opportunity for strategic use of the tariff system to impose unreasonable rates that are not subject to effective competition.

60. At the same time, we believe that our benchmark mechanism may actually result in increased access revenues for many CLECs. Many IXCs disputing the reasonableness of CLEC access rates have either been paying only the ILEC rate or have refused payment altogether. For these CLECs, our approach should provide greater certainty, and a more reliable stream of revenue, because we conclude that CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate. Similarly, because of the conclusive presumption of reasonableness that we will accord to tariffed rates at or below the benchmark, a CLEC with qualifying rates will not be subject to a section 208 complaint challenging its rates.

61. We expect that some IXC participants in this proceeding will find fault with our ruling because it does not immediately reduce CLEC access charges to the rates charged by incumbent LECs. It is true that, for the three-year phase-in period, many tariffed CLEC access rates will continue to exceed the prevailing market price charged by the ILEC. However, by limiting tariffed rates to our benchmark, we have immediately provided IXCs with relief from the substantially higher rates that many CLECs have been tariffing. In addition to the immediate relief on access charges that the benchmark mechanism affords IXCs, it also ensures that CLEC access rates will continue to decline until they reach the level of the ILEC rates. In setting the benchmark, we have adopted, on a prospective basis and over the long run, the IXCs' argument that the reasonable rate for CLEC access service is the rate that the ILECs are charging for similar service in the market. We decline, however, immediately to drop the CLEC rate to that point.

62. This type of transitional mechanism is vitally important to avoid too great of a dislocation in the CLEC segment of the industry. As noted above, the Commission has taken a broad variety of steps to ensure the development of local competition in keeping with the explicit goals of the 1996 Act. Avoiding unnecessary damage to this growing competition, as likely would result from an immediate transition to the ILEC rate, is consistent with our approach in other proceedings, such as the reform of reciprocal compensation that we recently adopted, in which we have sought to reduce the opportunity for regulatory arbitrage but have nevertheless provided a transition mechanism to prevent too great of a revenue shock to a particular group of carriers.[132] This transition period is necessary to permit CLECs to adjust their business plans and

[132] *See Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131. *See also Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15,982, 16002, FCC 97-158, para. 46 (1997) ("we are concerned that any attempt to move immediately to competitive prices for [certain ILEC access] services would require dramatic cuts in access charges for some carriers. Such an action could result in a substantial decrease in (continued....)

obtain alternative sources for the substantial revenues of which the benchmark will deprive them – revenues on which they have previously relied in formulating their business plans because they were not held to the regulatory standards imposed on ILECs.

63. Again, we emphasize that we adopt this benchmark approach on an *interim* basis. Concurrent with our adoption of this order, we initiate a proceeding in which we will broadly examine various categories of existing intercarrier compensation regimes and seek comment on whether these existing rules lead to efficient usage of, and investment in, network infrastructure, or to the efficient development of competition.[133] In that proceeding, we seek comment on whether alternative rules for access charges might limit the ability of LECs, including CLECs, to exercise market power in their provision of access service.

### E. Safe Harbor Rates for Rural CLECs

64. Limiting CLECs to the higher of the benchmark rate or the access rate of its ILEC competitor could prove rather harsh for some of the small number of CLECs that operate in rural areas.[134] The difficulty would likely arise for those CLECs that operate in a rural area served by a price-cap incumbent with state-wide operations. Our rules require such ILECs to geographically average their access rates.[135] This regulatory requirement causes these "non-rural ILECs" effectively to use their low-cost, urban and suburban operations to subsidize their higher cost, rural operations, with the effect that their state-wide averaged access rates recover only a portion of the ILEC's regulated costs for providing access service to the rural portions of its study area. During the course of this proceeding, we became concerned that tying the access rates of rural CLECs to those of such non-rural ILECs could unfairly disadvantage CLECs that lacked urban operations with which they could similarly subsidize their service to rural areas. Accordingly, we sought comment on whether the phenomenon of the non-rural ILEC justified the creation of a "rural exemption" to our benchmark scheme and, if so, how that exemption should be structured.[136]

#### 1. Whether to Create a Rural Exemption

65. We conclude that the record supports the creation of a rural exemption to permit rural CLECs competing with non-rural ILECs to charge access rates above those charged by the competing ILEC. First, we note that such a device is consistent with the Commission's obligations, under section 254(d)(3) of the Act and section 706 of the 1996 Act, to encourage the

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revenue for incumbent LECs, which could prove highly disruptive to business operations, even when new explicit universal support mechanisms are taken into account.").

[133] *See Intercarrier Compensation NPRM*, FCC 01-132.

[134] *See, e.g.*, ALTS Safe Harbor Comments at 5; CTSI Safe Harbor Comments at 9-11; Minnesota CLEC Safe Harbor Comments at 2-7; RICA Safe Harbor Comments at 4-9.

[135] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report & Order, 5 FCC Rcd 6786, 6788 (1990); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 866 (1995).

[136] *Safe Harbor Public Notice*, 15 FCC Rcd 24102, ¶¶ 5-7.

deployment to rural areas of the infrastructure necessary to support advanced telecommunications services and of the services themselves.[137] The record indicates that CLECs often are more likely to deploy in rural areas the new facilities capable of supporting advanced calling features and advanced telecommunications services than are non-rural ILECs, which are more likely first to deploy such facilities in their more concentrated, urban markets.[138] Given the role that CLECs appear likely to play in bringing the benefits of new technologies to rural areas, we are reluctant to limit unnecessarily their spread by restricting them to the access rates of non-rural ILECs.

66. We are persuaded by the CLEC comments indicating that they experience much higher costs, particularly loop costs, when serving a rural area with a diffuse customer base than they do when serving a more concentrated urban or suburban area.[139] The CLECs argue that, lacking the lower-cost urban operations that non-rural ILECs can use to subsidize their rural operations, the CLECs should be permitted to charge more for access service, as do the small rural incumbents that charge the National Exchange Carrier Association (NECA) schedule rates.[140] We note in this regard that a rural exemption will also create parity between the rural CLECs competing with NECA carriers and those competing with non-rural ILECs.

67. In adopting the rural exemption, we reject the characterization of the exemption as an implicit subsidy of rural CLEC operations.[141] It is true that an exemption scheme will permit rural CLECs to charge IXCs more for access to their end-user customers than was charged by the non-rural ILECs from whom the CLECs captured their customers. But that does not necessarily justify limiting the rural CLEC to the access rates of the non-rural ILEC. The same increase in access rates would occur if, rather than entering an area as a competitive carrier, a small local-service provider were to purchase a rural exchange and thus become the rural ILEC serving the end users in that exchange.[142] In that event, the IXC's cost for access to the exchange's end users

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[137] *See* 47 U.S.C. § 254(d)(3); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153, (1996) (reproduced in the notes under 47 U.S.C. § 157).

[138] *See e.g.*, RICA Safe Harbor Comments at 2.

[139] *Cf.* RICA Safe Harbor Reply comments at 7.

[140] *See* Minnesota CLEC Safe Harbor Reply Comments at 2; NTCA Safe Harbor Comments at 4-5; BayRing Safe Harbor Comments at 23; BayRing Safe Harbor Reply Comments at 3-4. The National Exchange Carrier Association is a non-stock, not-for-profit association that the FCC established in 1983, *inter alia*, to administer its Access Charge Plan and the associated pools and tariffs. *See* 47 C.F.R. §§ 69.601, *et seq.* NECA files interstate access tariffs for primarily small, rural and high-cost ILECs that participate in its common line or traffic-sensitive pools. NECA has over one thousand members that are either "cost" or "average schedule" companies. Cost companies submit cost studies to NECA; these studies form the basis for the cost companies' settlements with the NECA pools. For average schedule companies, NECA collects cost information from selected representative members on a periodic basis. It uses this information to generate average schedule rates. These rates, rather than the actual costs of the individual average schedule companies, govern the settlements of these average schedule companies with the NECA pools. The data from the cost companies and the average schedule companies together provide the support for the development of the NECA tariffs.

[141] *See* AT&T Safe Harbor Reply Comments at 12-13.

[142] *Cf.* RICA Safe Harbor Reply Comments at 7. *See also* OPASTCO Safe Harbor Comments at 4 (many rural ILECs pursue an "edge-out" strategy, moving into territory of adjacent ILEC as competitor; arguing that, since (continued....)

would also increase, as the new ILEC likely would charge either NECA schedule rates or conduct a cost study to support its own access rates, and our rules would permit either outcome. This analysis leads us to conclude that the exemption we adopt today is not properly viewed as an implicit subsidy of rural CLEC operations. Instead, it merely deprives IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas.

68. Our level of comfort in creating a rural exemption is markedly increased by the fact that the record indicates it likely will apply to a small number of carriers serving a tiny portion of the nation's access lines. The Rural Independent Competitive Alliance (RICA) asserts that, fewer than 100,000 access lines are served by carriers falling in the definition that it proffers for a rural CLEC.[143] This number is entirely overwhelmed by the approximately 192 million access lines reported by the Commission in its last report on local telephone competition.[144] Indeed, this figure for rural CLECs' customers amounts to substantially less than one percent of the 12.7 million lines served by CLECs.[145] We acknowledge that the definition for a rural CLEC that we adopt below is somewhat broader than that proposed by RICA.[146] It nevertheless appears likely to encompass only a small number of the overall total of CLEC end users.

69. We reject AT&T's argument that CLECs must rely solely on the *CALLS Order*'s interstate access support when entering the territories of non-rural ILECs. The *CALLS Order*'s $650 million portable universal service support mechanism represented the amount necessary to compensate participating ILECs for the subsidies that the order removed from their access revenues. This interstate access support mechanism is portable, but that does not necessarily indicate that it fully reflects the costs (above those recovered through ILEC access rates) that a rural CLEC would encounter in serving customers in the high-cost areas for which the subsidy is available. For example, we note that a CLEC entering the territory of a non-rural ILEC likely would not enjoy the economies of scope and scale that the ILEC does in the same territory.

70. We are also skeptical of AT&T's assertions about the incentives that would flow from a rural exemption. First, AT&T argues that the exemption would "create perverse incentives for uneconomic competitive entry by CLECs in any 'rural' areas in which it might be applicable."[147] It appears from the record that both AT&T and Sprint have routinely been paying

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these carriers charge NECA rates in their home territories, they should also be permitted to do so in areas they enter competitively).

[143] RICA Safe Harbor Comments at 17.

[144] *See* Industry Analysis Division, FCC, *Local Telephone Competition: Status as of June 30, 2000* at 1 (rel. Dec. 4, 2000) (*Local Telephone Competition*).

[145] *See id.*

[146] Below, we define rural areas as those falling outside of (1) any incorporated place of 50,000 inhabitants or more or (2) an urbanized area defined by the Census Bureau. *See infra* paragraph 76. RICA, on the other hand, proposes to include within the first portion of the definition only incorporated places of 20,000 inhabitants or more. *See* RICA Safe Harbor Comments at 6.

[147] AT&T Safe Harbor Comments at 13.

for CLEC access billed at the rate charged by the competing incumbent. If AT&T were accurate in its projection about higher access rates spurring a rash of uneconomic market entry in rural areas, such uneconomic entry should already have occurred in the territories of the rural incumbent carriers that charge the higher NECA rates. However, the record fails to indicate such a trend. Additionally, we note WorldCom's assertion that geographically variable rates will create the incentive for CLECs to make it appear, through "foreign exchange type offerings," as if their end users were located in rural areas when they are not.[148] Here again, it appears that this incentive already has existed for any CLECs that choose to compete with NECA carriers and that consequently would receive the equivalent of NECA rates from Sprint and AT&T. However, the record discloses no significant attempt by CLECs to collect high charges for access to end users that are actually located outside of the NECA carriers' territory.

71. We are similarly unpersuaded by AT&T's argument that a rural exemption will cause a proliferation of chat line providers in the territories served by rural CLECs. We recognize that AT&T has alleged that, in certain circumstances, it violates the Act for a LEC with relatively high access rates (such as a NECA carrier) to serve a chat line provider as a means of increasing the LEC's access traffic.[149] It appears that the conduct that AT&T challenges in these proceedings grows out of the arbitrage opportunity created by the higher access rates charged by rural NECA carriers. However, we are skeptical that the rural exemption that we create today will add markedly to AT&T's problem in this regard. The FCC recently reported that non-price cap incumbent carriers served in excess of 12 million lines in the U.S.[150] The bulk of these carriers either charge NECA access rates or something similar. Adding less than one percent to the number of rural lines eligible for higher access rates seems highly unlikely to increase dramatically the arbitrage opportunities involving chat line providers.

72. Furthermore, as we have noted previously, the mechanism that we implement today serves as only a transitional solution to a portion of the much larger question of inter-carrier compensation. We are examining the broader questions of inter-carrier compensation through a notice of proposed rulemaking. Additionally, the Commission currently has before it the Multi-Association Group (MAG) Plan, which has as one of its goals the reduction of rural ILECs' access charges.[151] Below, we tie the rates for rural CLECs to the NECA rates charged by rural ILECs. Accordingly, as our access reform efforts for rate-of-return carriers and our other efforts on inter-carrier compensation bring down the access rates of rural ILECs, any opportunities for arbitrage growing out of the exemption for rural CLECs will also diminish.

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[148] WorldCom Safe Harbor Reply Comments at 4.

[149] *See* AT&T Safe Harbor Reply Comments at 16. AT&T has raised these allegations in complaint proceedings that remain pending at the Commission. Our discussion of the issue presented in these proceedings should not be interpreted as prejudging them in any way.

[150] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. Table 8.2 (Dec. 2000).

[151] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Notice of Proposed Rulemaking, FCC 00-448 (rel. Jan. 5, 2001).

73. We thus conclude that the record supports the creation of a rural exemption to the benchmark scheme that we adopt for CLEC access charges. Under this exemption, a CLEC that is operating in a rural area, as defined below, and that is competing against a non-rural ILEC may tariff access rates equivalent to those of NECA carriers. Below we discuss more precisely the CLECs to which this exemption will be available and the access rates that they may impose by tariff.

### 2. Carriers Eligible for Rural Exemption

74. In response to our public notice inquiring about the potential of the rural exemption from our benchmark scheme, we received a variety of suggested structures. CTSI and BayRing assert that the exemption's higher access rates should be available on an end-user-by-end-user basis for all customers living outside of density zone 1 of the nation's top 50 metropolitan statistical areas (MSAs), a standard that would open the exemption to a far broader range of carriers than we think is necessary to promote competitive entrants in truly rural areas.[152] As Sprint notes, this definition of rural would "include metropolitan areas having populations of up to 958,000, and would include such sizable cities as Honolulu, Tucson, Tulsa, Omaha, and Albuquerque."[153] At the other extreme, Sprint argues that the exemption should be available to a CLEC that serves both business and residential customers and that operates exclusively outside of any MSA.[154] As some commenters assert, this definition may be overly exclusive because MSAs typically include the full area of the counties contiguous with the central population center, and, especially in the case of larger counties, may therefore include substantial areas that are undeniably rural.

75. Administrative simplicity is an important consideration in our choice of a way to define rural CLECs. Thus, we conclude that the availability of the exemption (and the higher access rates that come with it) should be determined based on the CLEC's entire service area, not on a subscriber-by-subscriber basis. Similarly, we are concerned that the definition rely on objectively available information that will not require extensive calculation or analysis by either carriers or this Commission. For example, many comments suggest that, at bottom, density is the factor that should determine whether an area qualifies as rural; it is the factor that reflects a LEC's loop lengths and, not surprisingly, the number of potential subscribers in an area. The factors of longer loop length and lower concentration of potential subscribers are, in turn, what motivate us to permit higher access rates in rural areas. However, our concern with objectivity leads us to conclude that rural CLECs should not be defined explicitly by the population density in their service areas because density figures for the irregular areas likely to be served by CLECs – areas that typically will not correspond to state or municipal boundaries or to Census Bureau divisions – are not readily available.

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[152] BayRing Safe Harbor Comments at 21-22; CTXI Safe Harbor Comments at 11-14. The Office of Management and Budget defines metropolitan statistical areas. Essentially, they encompass cities with a population of more than 50,000 and all of the adjoining counties. *See* Alternative Approaches to Defining Metropolitan and Nonmetropolitan Areas, 63 Fed. Reg. 70525, 70526 (OMB 1998). Currently, there are 258 MSAs in the country.

[153] Sprint Safe Harbor Reply Comments at 7.

[154] *See* October 11, 2000 letter of Richard Juhnke, Sprint Corp., to Magalie Salas, Secretary, FCC, CC Dkt. No. 96-262.

76. We conclude that the rural exemption to our benchmark limitation on access charges will be available for a CLEC competing with a non-rural ILEC, where no portion of the CLEC's service area falls within: (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (2) an urbanized area, as defined by the Census Bureau.[155] Thus, if any portion of a CLEC's access traffic originates from or terminates to end users located within either of these two types of areas, the carrier will be ineligible for the rural exemption to our benchmark rule. Relying on information that is readily and publicly available, this definition excludes from the exemption those CLECs operating within reasonably dense areas that are not typically considered to be rural. It does not, however, exclude from eligibility entire counties that border high population areas, as would a definition based on MSAs.

77. Sprint has raised the issue of how best to ensure that the rural exemption does not create the potential for abuse and that it is restricted to CLECs that are serving rural end users.[156] Thus, Sprint is concerned about the potential for competitive carriers, with some qualifying end users, creating two separate operating entities so that the one serving rural end users could tariff the higher access rate permitted under the exemption. While we want to forestall that strategy for exploiting our rule, we also realize that certain incumbents with urban (or non-rural) operations may choose to enter adjacent rural markets as a competitive carrier. To the extent that such carriers provide the benefit of competition in rural markets, their non-qualifying incumbent operations should not operate entirely to deny them the benefit of the rural exemption. Accordingly, we decline Sprint's invitation to examine all of the subsidiary operations of a holding company in order to determine the applicability of the rural exemption. We expect that we will be able to address, on a case-by-case basis, the improper exploitation of our rule – such as a competitive carrier's splitting itself into two subsidiaries to qualify, in part, for the exemption rates where it would not otherwise do so.

78. Our definition for rural CLECs closely resembles the first major division of the Act's definition for rural telephone companies.[157] It departs from the remaining three major divisions of the definition either because they would be administratively burdensome, or because they would be overly inclusive or irrational when applied solely to CLECs.[158] Our definition

[155] An urbanized area "is a continuously built-up area with a population of 50,000 or more. It comprises one or more places – central place(s) – and the adjacent densely settled surrounding area – urban fringe – consisting of other places and nonplace territory." U.S. Bureau of the Census, GEOGRAPHIC AREAS REFERENCE MANUAL at 12-1; available at http://www.census.gov/ftp/pub/geo/www/GARM/Ch12GARM.pdf (visited February 7, 2001). *See also id.* at 12-7 to 12-8 (further discussion of criteria for defining urbanized areas). 405 urbanized areas were defined by the time of the 1990 census. *Id.* at 12-5.

[156] *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

[157] *See* 47 U.S.C. § 153(37)(A).

[158] We do not adopt the portion of the Act's definition that classifies as rural those companies providing service to "fewer than 50,000 access lines," 47 U.S.C. §153(37)(B), because it would permit a CLEC serving 45,000 access lines in downtown Manhattan or Los Angeles to qualify as rural. Because CLECs may not have assigned geographic areas in which they must offer service to all subscribers, the portion of the definition relating to carriers serving study areas with fewer than 100,000 access lines, *id.* § 153(37)(C), simply does not apply to CLECs. Finally, because we decline, for reasons of administrative simplicity, to get into a subscriber-by-subscriber analysis (continued....)

adopts 50,000, rather than 10,000, as the population cut-off for incorporated places because we are concerned that, without the statute's remaining three portions of the definition as a way for a company to attain rural status, the 10,000-person threshold would be unduly restrictive and deny the exemption to companies operating in areas that would generally be viewed as rural.

79. It is also necessary to discuss briefly the type of carrier with which a CLEC must be competing in order to qualify for the rural exemption. Our intent is that this exemption will permit a CLEC to tariff access rates above the competing ILEC's only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers. We conclude that the most effective and objective means of accomplishing this is to allow the rural exemption only to those CLECs that are competing with price-cap ILECs that do not qualify as "rural telephone companies" under the Act's definition.[159] Those CLECs competing with carriers that qualify as rural under the Act's definition are excluded from the rural exemption and are therefore limited, under the rule we announce above, to tariffing access rates equal only to those of the competing ILEC.

### 3. Rate for Exemption Carriers

80. The final question with respect to the rural exemption is what the access service benchmark is for those carriers that qualify. We adopt the NECA tariff for switched access service as the standard that is the most appropriately reflective of the considerations that should go into pricing the access service of rural CLECs. Accordingly, qualifying rural CLECs may tariff rates at the level of those in the NECA access tariff, assuming the highest rate band for local switching and the transport interconnection charge, *minus* the tariff's carrier common line (CCL) charge if the competing ILEC is subject to our *CALLS Order*. Above this benchmark, rural CLECs will be mandatorily detariffed in their provision of access services.

81. We adopt the NECA access rate because it is tariffed on a regular basis and is routinely updated to reflect factors relevant to pricing rural carriers' access service. We choose the highest rate bands for the two variable rate elements because the opportunity to tariff those rates will most effectively spur the development of local-service competition in the nation's rural markets and because the burden created by choosing the highest rate will be relatively minor, owing to the small number of carriers involved. We deny rural CLECs the NECA tariff's CCL charge when they compete with a *CALLS* ILEC because the price-cap LECs' CCL charge has been largely eliminated through implementation of higher subscriber line charge (SLC) caps and the multi-line business PICC. CLECs competing with *CALLS* ILECs are free to build into their end-user rates a component approximately equivalent to (or slightly below) the ILEC's SLC, as well as assessing IXCs a multi-line business PICC. These potential revenue sources obviate the need for a CCL charge, which NECA carriers use to recover loop costs that cannot be recovered because of their lower SLC caps and the absence of PICCs.

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of where a CLEC's end-user customers are located, we decline to adopt that portion of the Act's definition that defines as rural those companies with less than 15 percent of their access lines within a community of more than 50,000 people. *Id.* § 153(37)(D).

[159] 47 U.S.C. § 153(37).

## F. Forbearance Analysis for Rates Above the Benchmark

82. As previously indicated, we conclude that, a CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark. During the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate. In order to implement this approach, we adopt mandatory detariffing for access rates in excess of the benchmark. That is, we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark.[160]

83. Section 10 of the Act requires, *inter alia*, that the Commission forbear from applying any regulation or provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain statutory conditions are satisfied.[161] Because section 10 permits us to exercise our forbearance

[160] *See* 47 U.S.C. § 160 (forbearance authority); 47 C.F.R. Part 61 (tariff regulations). As modified by the *Hyperion Order*, our tariff rules currently subject CLECs to permissive detariffing and set no pre-determined limits on the level of charges that CLECs may establish by tariff. *See supra* paragraph 12 (discussing *Hyperion Order*). We note that the law is somewhat unclear on which section of the Act requires or permits the filing of interstate access tariffs. In *Lincoln Telephone & Telegraph Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981), the Court of Appeals for the D.C. Circuit stated in dicta that access providers qualified as "connecting carriers" and were therefore exempt from the tariff-filing requirements of section 203(a). Rather, the court opined, the Commission could "exercise the residual authority" of section 4(i) to require tariffing of access services. *Id.* at 1109. In contrast, the court in *Advamtel v. AT&T* appears to have assumed that section 203 supported the tariffing of interstate access services. *See* 118 F. Supp. 2d at 683-84, 688.

[161] 47 U.S.C. § 160. Section 10(a) provides that:

> (a) REGULATORY FLEXIBILITY. – Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, form or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest."

47 U.S.C. § 160(a). Section 10(b) further provides:

> (b) COMPETITIVE EFFECT TO BE WEIGHED. -- In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

47 U.S.C. § 160(b).

authority with respect to classes of services, we conduct a forbearance analysis only for those CLEC interstate access services for which the aggregate charges exceed our benchmark. For this class of services, we conclude that the section 10 forbearance criteria are satisfied; accordingly, we must take action pursuant to the terms of this statute.

84. Under the first criterion for forbearance, we examine whether our tariff filing requirements for CLEC interstate access services priced above the benchmark are necessary to ensure that rates for these services are just and reasonable and not unreasonably discriminatory.[162] We conclude they are not. As noted above, CLECs are positioned to wield market power with respect to access service. Requiring CLECs to negotiate with their IXC customers in order to obtain access rates above the benchmark will limit the CLECs' ability to exercise this market power and unilaterally impose rates above the level that we have found to be presumptively reasonable.

85. We are not persuaded by CLEC commenters that contend they will be unable to negotiate agreements with IXCs because IXCs wield significant market power in the purchase of access services. We find these claims of IXC monopsony power unsupported in the record. We note that three major IXCs are purchasers in the market for access services, and numerous smaller players also purchase LEC access services. Moreover, we note that our tariff rules were historically intended to protect purchasers of services from monopoly providers, not to protect sellers from monopsony purchasing power. We conclude that other remedies, like those under the antitrust laws, are available to protect CLECs from the exploitation of any monopsony power that IXCs may possess.[163]

86. Under the second forbearance criterion, we must determine whether tariffing of CLEC access charges above the benchmark is necessary to protect consumers.[164] Such tariffing is not necessary to ensure that consumer rates are just and reasonable. To the contrary, requiring negotiation of access rates above the benchmark will provide greater assurance that the rates are just and reasonable and will likely prevent CLECs from using long distance ratepayers to subsidize their operational and build-out expenses. It is possible that the reduction of CLEC access revenue caused by the benchmark scheme will increase the rates CLECs charge their end users. However, all CLEC end users have competitive alternative service providers, in the form of regulated incumbents. We are therefore not concerned that any increase in CLEC end-user rates will unduly harm consumers. To the extent that this provision requires us to examine the effect on the IXC consumers of CLEC access services, mandatory detariffing likely will protect that group by removing the CLEC's ability unilaterally to impose excessive rates through the tariff process.

87. The third forbearance criterion requires that we determine whether mandatory detariffing of CLEC access services priced above the benchmark is consistent with the public

[162] 47 U.S.C. § 160(a)(1).

[163] *See, e.g., United States v. Griffith*, 334 U.S. 100, 108 (1948); *Sunshine Cellular v. Vanguard Cellular Sys.*, 810 F.Supp. 486, 493-94 (S.D.N.Y. 1992) (denying motion to dismiss monopsony claim with respect to cellular phone roaming services).

[164] 47 U.S.C. § 160(a)(2).

interest and, in particular, whether it will promote competitive market conditions.[165] We conclude, as discussed above, that adopting mandatory detariffing for access rates in excess of the safe harbor limit will subject to negotiation between two willing parties any access services offered at a rate above the benchmark. The negotiation-driven approach that we adopt will provide a better mechanism for IXCs to control costs, since they will not be subject to tariffs with unilaterally established rates at excessive levels. In addition, our benchmark system, with its presumption that qualifying rates are reasonable, will provide greater certainty for CLECs that they will receive full compensation for the access services that they provide. By limiting a CLEC's ability to shift its start-up costs onto the long-distance market, our benchmark approach will restrict market entry to the efficient providers. Accordingly, mandatory detariffing of CLEC access services above the benchmark fulfills all three of the criteria for forbearance.

## IV. INTERCONNECTION OBLIGATIONS

88. Although we have created a safe harbor for CLEC access rates, within which they will be presumed to be just and reasonable, the question remains of whether and under what circumstances an IXC can decline to provide service to the end users of a CLEC. In this proceeding, we sought comment on whether either section 201(a) or section 251(a) prohibit an IXC from declining to serve the customers of a CLEC because the IXC believes that the CLEC's access rates are too high. We also sought comment on whether an IXC must first obtain section 214 approval from the Commission before terminating service to CLEC customers.

89. Below, we conclude that section 201(a)'s requirement that a carrier provide communications service upon reasonable request obligates IXCs to serve the end users of a CLEC that is charging rates at or below the benchmark when the IXC is also serving the customers of other LECs in the same geographic area. We are optimistic that our conclusions in this regard will maintain the benefits of a seamless, interconnected public telephone network. Given the structure of the rules that we adopt, we need not address the applicability of section 214.

### A. Interconnection and Sections 201 and 251

90. Section 201(a) of the Communications Act states that it is "the duty of every common carrier engaged in interstate or foreign communication . . . to furnish such communication service upon reasonable request therefor."[166] It also requires that common carriers establish physical connection with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest."[167]

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[165] 47 U.S.C. § 160(b).

[166] 47 U.S.C. § 201(a).

[167] Section 201(a) states –

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish

(continued....)

Similarly, section 251(a)(1) of the Communications Act requires all telecommunications carriers to interconnect directly or indirectly with each other.[168]

91. CLECs contend that sections 201(a) and 251(a)(1) require IXCs to accept all originating, and deliver all terminating, access traffic and to comply with all reasonable requests for interconnection.[169] IXCs, on the other hand, contend that a carrier's decision whether to interconnect is a matter of business judgment that is not subject to section 201(a).[170] They further argue that section 251(a)(1) only obligates a carrier physically to interconnect with the facilities of other carriers and does not require the acceptance or delivery of access traffic.[171]

92. We are generally persuaded by the IXCs' arguments. Sections 201(a) and 251(a)(1) do not expressly require IXCs to accept traffic from, and terminate traffic to, all CLECs, regardless of their access rates. In the *Local Competition Order*, the Commission found that a section 251(a)(1) duty to interconnect, directly or indirectly, is central to the Communications Act and achieves important policy objectives.[172] However, the Commission construed the statute to require only the physical linking of networks, not to impose obligations relating to the transport and termination of traffic.[173] Section 201 empowers the Commission, after a hearing and a determination of the public interest, to order the physical connection of networks and to establish routes and charges for certain communications. This also falls short of creating the blanket duty that the CLECs seek to impose on the IXCs to accept all access service, regardless of the rate at which it is offered. Certainly, we have made no finding that the public interest dictates such broad acceptance of access service, whatever its price. Nevertheless, we conclude that section 201(a) places certain limitations on an IXC's ability to refuse CLEC access service.

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through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. § 201(a).

[168] Section 251(a)(1) states that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. §251(a).

[169] Teligent Comments at 3-5; Allegiance Comments at 6; ALTS Comments at 25; Alltel Comments at 5; RCN Comments at 6-8; MGC Comments at 17; Minnesota CLEC Comments at 3-5; Winstar Comments at 6-7; RICA Comments at 7-9; USTA Comments at 21-22.

[170] AT&T Reply Comments at 29-30; Sprint Comments at 24-25; WorldCom Comments at 19.

[171] Sprint Reply Comments at 22-24.

[172] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15988-15991 (1996) (*Local Competition Order*). MGC Comments at 17-18.

[173] The Commission's rules implementing section 251(a)(1) define "interconnection" as the "linking of two networks for the mutual exchange of traffic" and state that it "does not include the transport and termination of traffic." 47 C.F.R. § 51.5.

93. We agree that universal connectivity is an important policy goal that our rules should continue to promote. The public has come to value and expect the ubiquity of the nation's telecommunications network. Accordingly, any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service.[174]

94. We therefore conclude that an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a). That section imposes on common carriers the obligation to furnish communication service "upon reasonable request therefor." As set out above, we will conclusively presume that a CLEC's access rates are reasonable if they fall at or below the benchmark that we establish herein. When an IXC's end-user customer attempts to place a call either from or to a local access line, that customer makes a request for communication service – from the originating LEC, the IXC and the terminating LEC. When that customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a).[175] This obligation may be enforced through a section 208 complaint before the Commission.[176]

### B. Section 214 and Discontinuance of Service

95. Section 214 of the Communications Act and section 63.71 of the Commission's rules govern an IXC's withdrawal of service. Section 214 of the Communications Act provides, in relevant part, that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely

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[174] Winstar Comments at 5; OPASTCO Comments at 2-3; Allegiance Comments at 8; MGC Comments at 16-17; Minnesota CLEC Comments at 3-5; RCN Comments at 8; Winstar Comments at 6-7; RICA Comments at 7-9; USTA Comments at 21-22; WorldCom Reply Comments at 14. *See also* ITC Reply Comments at 6-7 (regulatory intervention is necessary when market forces fail to ensure customer expectations of call completion). Even Sprint acknowledges that an IXC's refusal to exchange traffic is undesirable. *See* Sprint Comments at 24.

Incumbent LECs also are generally supportive of the approach we adopt in this Order. For example, SBC argues that an IXC that chooses to serve a geographic area as a common carrier should serve all users inside that area, and should not be allowed to refuse or discontinue service to those served by any LEC with whom the IXC cannot agree upon access rates. *See* SBC Reply Comments at 6. It further contends that all section 201 interconnection obligations must be correspondingly limited if the Commission determines that an IXC has the power to discontinue service. *Id. See also* US West Comments at 26.

[175] Naturally, our decision in this regard does not mean that an IXC would be amenable to suit under section 201(a) if it received a request for service to or from an area of the country that it does not otherwise serve. Thus, for example, this order does not place a section 201(a) obligation on a Bell operating company to accept originating access traffic from one of its in-region states for which it has not yet received section 271 authority to carry interLATA traffic.

[176] 47 U.S.C. 208(a). This section of the statute explicitly states that "[n]o complaint shall . . . be dismissed because of the absence of direct damage to the complainant." *Id.*

affected thereby."[177] In light of the solution we adopt herein, we need not address the application of either section 214 or our rule 63.17.

96. Above, we conclude that it would be a violation of section 201(a) for an IXC to refuse CLEC access service, either terminating or originating, where the CLEC has tariffed access rates within our safe harbor and, in the case of originating access, where the IXC is already providing service to other members in the same geographical area. Since section 201(a) already prohibits such a withdrawal of service, we need not address the question of whether section 214 applies to an IXC that finds itself in that position.

97. The remaining possible scenario to which section 214 might apply is that in which a CLEC wishes to charge access rates above our benchmark and an IXC will not agree to pay them. Under the rules we adopt today, a CLEC must charge the benchmark rate during the pendency of negotiations or if the parties cannot agree to a rate in excess of the benchmark. In either case, since the benchmark rate is conclusively presumed reasonable, an IXC cannot refuse to provide service to an end user served by the CLEC without violating section 201. Here again, we need not address the applicability of section 214.

## V. FURTHER NOTICE OF PROPOSED RULEMAKING

98. Shortly before we issued this item, AT&T asserted, for the first time in this proceeding, that CLEC originating 8YY, toll-free traffic should be subject to a different benchmark scheme than other categories of switched access traffic.[178] AT&T argues that the benchmark for CLEC 8YY traffic should immediately move to the access rate of the competing ILEC and that CLECs should be mandatorily detariffed above that point.[179] In support of this position, AT&T asserts that certain CLECs with higher access charges attempt to obtain as customers end users that typically generate high volumes of 8YY traffic, such as hotels and universities. AT&T further asserts that some CLECs then "install limited, high-capacity facilities designed only to handle 8YY traffic" and "share their access revenues with the customers generating the [8YY] traffic" through agreements that provide for payments to the end user based on the level of 8YY traffic it generates.[180] AT&T contends that such arrangements do not promote the development of local exchange competition. Rather, it argues that these arrangements merely create the incentive for end users artificially to generate heavy 8YY traffic loads, which, in turn generate revenues for CLECs and their end-user customers.[181]

99. Given the paucity of record evidence on this issue, we seek comment generally on AT&T's proposal immediately to benchmark CLEC 8YY access services to the ILEC rate. Is the

[177] 47 U.S.C. § 214.

[178] *See* March 29, 2001 letter of Robert Quinn, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262 (AT&T March 29, 2001 letter); April 3, 2001 letter of Robert Quinn, AT&T, to Jeff Dygert, Assistant Chief, Common Carrier Bureau, CC Dkt. No. 96-262 (AT&T April 3, 2001 letter).

[179] *See* AT&T March 29, 2001 letter at 1-2.

[180] *Id.* at 2.

[181] AT&T April 3, 2001 letter at 2.

generation of 8YY traffic in order to collect greater access charges, as AT&T complains, something that the Commission should attempt to address through a rulemaking, or should the IXCs be left to address specific instances of abuse directly with the relevant CLEC, with the aid of the Commission's complaint process where appropriate?[182] In this regard, we note AT&T's assertion that one recent case of apparent abuse, confirmed by WorldCom, arose from the sequential dialing of over 800,000 8YY calls by a single end user.[183] It appears that, even without the rule it now requests, AT&T may, through discussions with the relevant CLEC, have been able to act to prevent payment for improperly generated 8YY access minutes.

100. We seek comment on the magnitude of the potential problem with 8YY traffic that AT&T identifies. AT&T estimates that approximately 30% of its CLEC access traffic is generated by 8YY aggregators that, it speculates, have revenue-sharing agreements with their end-user subscribers.[184] Is this an accurate figure across the industry? How many minutes and what premium over the competing ILEC rate does this represent? More generally, what proportion of CLEC access traffic is composed of originating 8YY service? What proportion of CLEC end users have 8YY revenue-sharing agreements with their carrier?

101. Are CLECs continuing to offer 8YY revenue-sharing agreements to their new end users, or are they currently available only to end users that negotiated them at some point in the past? Do CLECs notice a difference in the 8YY traffic patterns generated by end users with revenue-sharing agreements, compared to those end users without such agreements? What are the typical terms of a revenue-sharing agreement? Do they provide for payment of a per-minute fee for 8YY traffic, a per-call fee or some other arrangement? What is the magnitude of the fee paid? How, if at all, will the Commission's imposition of the switched-access benchmark affect CLECs' existing revenue-sharing agreements?

102. We are concerned that AT&T's proposed solution to the problem it identifies may paint with too broad of a brush. Does the existence of some CLECs' revenue-sharing agreements justify immediately limiting CLEC tariffed access rates for all 8YY traffic to the rate of the competing ILEC? Should the Commission instead impose such a limitation only on those CLECs that actually offer revenue-sharing agreements to their end users?

103. Additionally, we seek comment on AT&T's assertion that it promotes neither appropriate policy goals nor the development of local exchange competition when a CLEC carries an end user's 8YY traffic without also providing that end user with local exchange service or other types of access service.[185] Would we be justified in immediately tying 8YY access tariffs to the ILEC rate for all CLECs, regardless of the services that they provide to their end

[182] As AT&T indicates, the question of the propriety of a CLEC's revenue-sharing agreement is before the Commission in the complaint proceeding styled *U.S. TelePacific Corp v. AT&T*, File No. EB-00-MD-010 (complaint filed June 16, 2000).

[183] *See* Declaration of William J. Taggart III, paragraphs 3-4 (appended to AT&T April 3, 2001 letter).

[184] AT&T April 3, 2001 letter at 2. AT&T estimates that this translates into a premium of approximately $38 million above what it would have paid for similar services at the ILEC rate. *Id.*

[185] AT&T April 3, 2001 letter at 2.

users? Or would such a rule be appropriate, if at all, only for those CLECs that carry exclusively their end users' 8YY traffic? How does the presence or absence of revenue-sharing agreements, discussed above, fit into the analysis of whether a CLEC's service offerings support restricting their tariffed 8YY access rates to the competing ILEC's rate?

104. We question whether, at bottom, CLEC 8YY traffic is inherently worthy of lower access charges than are other types of access traffic. A CLEC provides a closely similar service and uses similar or identical facilities, regardless of whether it provides originating 8YY access service, or terminating or originating access service for conventional 1+ calls. Accordingly, we seek comment on whether the presence of certain incentives to generate artificially high levels of 8YY traffic necessarily justifies reducing the tariffed rate for all such traffic immediately to the ILEC rate. Should we instead presume that there exists some "legitimate" level of CLEC 8YY traffic that should be treated as other categories of access traffic and subject to a lower benchmark only the traffic that exceeds this "legitimate" level? If this is an appropriate alternative, how should we define the level at or below which 8YY access traffic may be subject to the higher tariff benchmark that we permit for other categories of CLEC access service? Additionally, we seek comment on any other reasons that CLEC 8YY traffic should be subjected to a different tariff benchmark than are other categories of CLEC access traffic. We also seek comment on whether, if we adopt a different benchmark for 8YY access services, there are any different tariff filing requirements or timetables that we might adopt to account for the resources available to small entities. Commenters should indicate whether and how such provisions would be consistent with our goals in this proceeding, including our obligation to ensure just and reasonable rates for interstate access services.

## VI. PROCEDURAL MATTERS

### A. Paperwork Reduction Act

105. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the Federal Register of OMB approval.

### B. Final Regulatory Flexibility Analysis

106. As required by the Regulatory Flexibility Act (RFA),[186] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Pricing Flexibility Order and Further Notice.*[187] The Commission sought written comments on the proposals in the *Pricing Flexibility*

[186] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[187] *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order and Further Notice*).

*Order and Further Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this order conforms to the RFA, as amended.[188]

### 1. Need for, and Objectives of, the Proposed Action

107. With this order, we address a number of interrelated issues concerning charges for interstate switched access services provided by competitive local exchange carriers (CLECs) and the obligations of interexchange carriers (IXCs) to exchange access traffic with CLECs. In so doing, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. We also seek to reduce regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. This order is designed to spur more efficient local competition and to avoid disrupting the development of competition in the local telecommunications market.

108. We accomplish these goals by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. However, to avoid too great a disruption for competitive carriers (many of which may fall within the SBA's definition of a small entity), we implement this approach in a way that will cause CLEC tariffs to ramp down over time until they reach the level tariffed by the incumbent LEC. This mechanism will mimic the operation of the marketplace, as competitive LECs ultimately will have tariffed rates at or below the prevailing market price. At the same time, this approach maintains the ability of CLECs to negotiate access service arrangements with IXCs at any mutually agreed upon rate. In this order, we also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

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[188] *See* 5 U.S.C. § 604. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this Order, the rules and statements set forth in those preceding sections shall be controlling.

Although we conduct a final regulatory flexibility analysis in this order, we note that we could also certify the rules we adopt will not "have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). CLECs have historically been subject to the just and reasonable rate requirement under section 201(b). However, in the past, the Commission has not adopted specific rules to guide CLECs in tariffing their access rates. In this order, we adopt a rules that will remove any uncertainty regarding the justness and reasonableness of CLECs' tariffed rates. In doing so, we relieve CLECs of the burdens previously associated with challenges to the justness and reasonableness of their tariffed access rates. Furthermore, as we have noted above, many CLECs with tariffed rates above the benchmark have been receiving at most partial payment for their access services. *See supra* paragraph 60. This order's creation of a presumption that rates at or below the tariff benchmark are just and reasonable will facilitate CLECs' attempts to collect their access charges through an action in the appropriate court. This will have a positive economic impact on the CLECs.

Similarly, all IXCs, including small entities, will benefit from reductions, both immediate and over time, in the tariffed access rates charged by CLECs. Moreover, IXCs, including any small businesses, will benefit from increased regulatory certainty about CLEC access rates as a result of this order. We expect that this will reduce the need for these IXCs to take other actions to ensure just and reasonable rates, such as initiating complaint proceedings. Accordingly, we conclude that there will be a positive impact for small IXCs.

...ant Issues Raised by Public Comment in IRFA

109. ...Order and Further Notice*, we sought comment on various, alterna... ...LECs from charging unreasonable rates for their switched ... tentatively concluded that the proposed rule changes would have no ... ...ive burdens of competitive LECs because they would have no addition... In response to the Notice, we received comments from more than 40 ... ex parte meetings addressing these issues. Among those parties, only AL... ...endent Competitive Alliance (RICA) commented specifically on t...

110. ...LEC's contention that the Commission's IRFA was incomplete.[191] ... ...e Commission, in the IRFA, did not adequately address: 1) proposals in t... ...originating access and "open-end" access services; 2) the pote... ...their tariffs or to eliminate those tariffs and negotiate individual contrac... ...rdens on other carriers, such as ILECs (which, ALLTEL asserts ... ...y their tariffs and perform cost studies). To the contrary, for several differe... ...e that the IRFA gave adequate notice of our proposals to address CLEC ac... ...hose to discuss, in the IRFA, the primary proposals set out in the Notice, ... in the Notice on a number of variations to those primary propo... ...A only expressly mentions proposals to address terminating ... ...to the text of the Notice, which discusses all variations of t... ...sals.[193] Moreover, we observe that the Notice and the IRFA were sufficie... ...l, including comments from many competitive LECs that likely ... ...all businesses under the closest applicable SBA definition. The IR... ...ent information so that the public could react to the Commission's ... ...manner.[194]

[189] *See als...* ...iting further comment on the IRFA that was included in the *Pricing Flexibility* ... We note that no parties addressed the IRFA in their comments to the *Safe Harbor Pr...*

[190] ALLTEL Comm... ...nts at 18.

[191] ALLTEL Co...

[192] *See also* RICA ... ...that the IRFA does not adequately assess the impact of the proposals on small CLECs).

[193] *Pricing Flexibi...* ...C Rcd at 14353.

[194] In considering ... ...e that many commenters in the proceeding addressed the administrative b... ...posals. We have taken the opportunity to reconsider our initial conclusions in th... ...paragraphs 119 through 127.

111. Second, with respect to the administrative burdens associated with our proposals in the Notice, we have reconsidered our tentative conclusion to adopt mandatory detariffing.[195] We note that many commenters, large and small, oppose the Commission's proposal to adopt mandatory detariffing for all CLEC access services. These commenters, like ALLTEL, argue that while mandatory detariffing would reduce burdens associated with filing tariffs, it would increase administrative burdens overall by imposing greater transaction costs on CLECs and IXCs.[196] Having received these almost unanimous comments, we conclude that we should not adopt our proposal to implement mandatory detariffing, at this time. Rather, we only adopt mandatory detariffing to the extent that a CLEC chooses to charge a rate that exceeds our defined benchmark. Under this approach, CLECs and IXCs – both large and small – will be able to continue to enjoy the benefits of a tariffed service.

112. Similarly, we take into account RICA's assertion that mandatory detariffing, as proposed, might cause particular hardship for CLECs operating in rural areas.[197] Again, we have factored these comments into our decision to adopt a benchmark system, pursuant to which CLECs will continue to be permitted to file tariffs for their switched access services. Thus, we believe that our approach adequately addresses the concerns of these CLEC commenters. Moreover, we restate that our decision to detariff rates above the benchmark was motivated by our conclusion that rates above that level would be excessive (absent an agreement between the parties) and would place an inappropriate burden on IXCs and long distance customers.[198] In this regard, we note that even the small CLECs covered by our RFA analysis are clearly prohibited by the Act and our rules from charging unjust or unreasonable rates.[199] This order is designed to prevent such unjust or unreasonable rates.

113. Finally, we reject ALLTEL's assertion that the proposals in the Notice would place additional regulatory burden on ILECs. The proposals applied solely to CLECs and IXCs and we find ALLTEL's arguments to be unsupported in the record.[200]

114. Although not responding specifically to the IRFA, many parties commented generally on the potential regulatory burdens associated with the Commission's various proposals. In brief, IXC commenters typically sought a mechanism to constrain CLEC access charges.[201] In contrast, CLEC commenters typically sought to preserve their freedom to set

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[195] Parenthetically, we believe that our tentative conclusion, in the IRFA, that there would be no effect on CLEC administrative burdens was reasonable, given that the Commission proposed to reduce, not increase, tariff filings. We have, nevertheless, taken ALLTEL's arguments into account, in reconsidering our proposal to adopt mandatory detariffing for all CLEC switched access services.

[196] ALLTEL Comments at 3-4;

[197] RICA Comments at 18-19.

[198] *See supra* paragraphs 37 - 39.

[199] 47 U.S.C. §§ 201, 202.

[200] *See, e.g., Pricing Flexibility Order and Notice*, 14 FCC Rcd 14221, 14338-49.

[201] *See, e.g.*, Sprint Safe Harbor Comments at 1.

access rates as they choose.[202] We note that there are small entities on both sides of this debate. We encourage readers of this FRFA also to consult the complete text of this order, which describes in detail our analysis of the issues.[203]

### 3. Description and Estimate of the Number of Small Entities to Which the Rules Apply

115. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[204] To estimate the number of small entities that may be affected by the proposed rules, we first consider the statutory definition of "small entity" under the RFA. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."[205] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[206] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.[207] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[208]

116. The rules adopted in this order apply to CLECs and IXCs. Neither the Commission nor the SBA has developed a definition of small CLECs or small IXCs. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[209] The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that telecommunications carriers file annually in connection with the Commission's

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[202] *See, e.g.*, CoreComm Comments at 1.

[203] *See also infra*, paragraphs 119 - 127 (discussing steps taken to minimize significant economic impact on small entities, and significant alternatives considered).

[204] 5 U.S.C. § 603(b)(3).

[205] 5 U.S.C. § 601(6).

[206] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

[207] 15 U.S.C. § 632. *See, e.g.*, *Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[208] 13 C.F.R. § 121.201.

[209] 13 C.F.R. § 121.210, SIC Code 4813.

universal services requirements.[210] According to our most recent data, 349 companies reported that they were engaged in the provision of either competitive access services or competitive local exchange services (referred to collectively as CLECs) and 204 companies reported that they were engaged in the provision of interexchange services.[211] Among these companies, we estimate that approximately 297 of the CLECs have 1500 or fewer employees and that approximately 163 of the IXCs have 1500 or fewer employees. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are 297 or fewer small CLECs, and 163 or fewer small IXCs that may be affected by the decisions and rules adopted in this order.

#### 4. Description of Reporting, Recordkeeping, and Other Compliance Requirements

117. ALLTEL asserts that the Commission's proposals in the Notice "could require CLECs to modify their tariffs or to eliminate those tariffs and negotiate individual contracts."[212] This argument was echoed by other commenters who assert that the Commission's proposal to adopt mandatory detariffing would increase carriers' transaction costs, even though tariff filing requirements would be eliminated.[213] We acknowledge these concerns and have decided not to adopt mandatory detariffing for all CLEC switched access services, at this time.[214]

118. Thus, pursuant to this order, we allow competitive LECs to continue to file tariffs, as long as the rates for those services are within the defined safe harbor. We recognize that many CLECs -- we estimate between 100-150 CLECs -- may be required to re-file their tariffs in order to comply with this order. Given that ALTS, an organization which represents many CLECs, has supported this proposal, we believe that any increased burden will be outweighed by the benefits associated with resolving these issues. Further, we conclude that it is a burden that is justified by the Act's requirement that all rates be just and reasonable. We are optimistic that this approach will provide a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail themselves of the convenience of a tariffed service offering. Thus, we believe that this approach should minimize reporting and recordkeeping requirements on IXCs and CLECs, including any small entities, while also providing carriers with considerable flexibility.

#### 5. Steps Taken to Minimize Significant Economic Impact on Small

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[210] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. 5.3 (Dec. 2000) (*Trends in Telephone Service*); 47 C.F.R. § 54.711 *et seq.*

[211] *Trends in Telephone Service*, Table 5.3

[212] ALLTEL Comments at 4.

[213] *See, e.g.*, ALTS Comments at 35 ("mandatory detariffing could be very costly for CLECs").

[214] *See supra* paragraph 42.

**Entities, and Significant Alternatives Considered**

119. Through this order, we seek to resolve contentious issues that have arisen with respect to CLEC switched access services. Because there are both small entity IXCs and small entity CLECs – often with conflicting interests in this proceeding -- we expect that small entities will be affected by any approach that we adopt. As discussed below, we conclude that our approach best balances these goals by removing opportunities for regulatory arbitrage and minimizing the burdens placed on carriers.

120. In this order, we adopt a benchmark approach to CLEC access charges. We find that this approach will minimize the impact of the rules on small entities in several ways. First, it allows small business CLECs to continue to enjoy the convenience of offering a tariffed service, an advantage sought by CLECs, many of which may be relatively new and small businesses. Second, it will enable small IXCs to purchase most access services via tariff, rather than having to negotiate agreements with every CLEC. Finally, our approach ensures that IXCs will continue to accept and pay for CLEC switched access services, as long as the CLEC tariffs rates within the Commission's benchmarks.[215] Many CLECs argued that such an outcome was essential for new, relatively small CLECs to continue to offer services.[216]

121. In this order, we consider and reject several alternatives to the benchmark approach. In particular, we also considered: 1) continuing to rely on market forces to constrain CLEC switched access charges; 2) adopting a mandatory detariffing policy, which would prohibit CLECs from filing any tariffs for their switched access services; and, 3) subjecting CLECs to the panoply of regulation with which incumbents must comply.

122. Although many CLECs contend that the Commission need not take any particular action with respect to CLEC switched access charges, we disagree.[217] We conclude that our action is compelled by several factors, including: 1) our desire to reduce regulatory arbitrage opportunities and to revise our rules to allow competitive market forces to constrain CLEC access charges; 2) growing evidence that CLEC switched access charges do not appear to be constrained by market forces; 3) significant concerns that allowing IXCs to refuse to exchange traffic without restriction may lead to a decline in the universal connectivity upon which telephone users have come to rely.

123. On the other hand, we do not impose mandatory detariffing for all CLEC switched access services because we believe that our benchmark approach will provide a less drastic alternative for carriers, including small entity CLECs and small entity IXCs.[218] For example, by enabling CLECs to continue to file tariffs within a safe harbor range, we respond to concerns expressed by many CLECs that complete detariffing of CLEC services would cause significantly

[215] We note that many CLECs sought action from the Commission precisely because IXCs threatened to cut off traffic and had stopped paying for CLEC switched access services. *See* RICA Comments at 21.

[216] *See, e.g.*, RICA Comments 18-20.

[217] *See, e.g.*, CoreComm Comments at 1.

[218] *See supra* paragraphs 35 - 44.

increased transaction costs. We note, as well, that many IXC commenters supported this solution.[219]

124. We also conclude that our benchmark approach is more desirable than subjecting CLECs to the panoply of ILEC regulation. The Commission has long stated its desire to allow competitive forces to constrain access charges. By adopting a benchmark approach, we continue to allow CLECs to tariff their services, while ensuring IXCs and long distance customers, generally, that CLEC rates will be just and reasonable. We note that no commenter favors subjecting CLECs to dominant carrier regulation.[220]

125. We also adopted a transition mechanism that should minimize the impact of the decision on all carriers, including small entities.[221] While we considered adopting a benchmark that would immediately drop CLEC access rates to that level charged by the competing incumbent LEC, we instead implement the benchmark through a three-year transition. This will allow CLECs, including any small businesses, a period of flexibility during which they can conform their business models to the new market paradigm that we adopt, herein. At the same time, by effecting significant reductions in switched access charges immediately, we will minimize the impact that excessive access rates might have on IXCs, including any small businesses. We believe that this transition should significantly reduce the impact of this order on small businesses.

126. In addition, by clarifying rules for the transport and origination of traffic between CLECs and IXCs, this order should continue to ensure the ubiquity of a fully interconnected telecommunications network that consumers have come to expect.[222] We considered counter-proposals from some carriers that there should be no obligation to exchange traffic;[223] however, we believe that our approach will best satisfy the expectations of end users who have come to rely on a seamless, fully-interconnected telephone network. Further, these rules should provide considerable assurance to CLECs, many of which may be small businesses, that seek to offer their customers access to the broadest range of IXCs possible. Many of these CLECs asserted that, without such a rule, larger, more established IXCs likely would refuse to exchange traffic with them, essentially driving them out of business.[224] Our rules should address this concern by requiring IXCs to exchange traffic with CLECs that tariff rates within the benchmark, where IXCs already exchange traffic with other carriers in the same geographic area.

127. Overall, we believe that this order best balances the competing goals that we have for our rules governing CLEC switched access charges. We have not identified any additional

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[219] *See, e.g.*, WorldCom Safe Harbor Comments at 3-6.

[220] *See, e.g.*, ALTS Reply Comments at 6.

[221] *See supra* paragraph 52.

[222] *See supra* paragraphs 90 - 94.

[223] *See, e.g.*, AT&T Comments at 27.

[224] *See, e.g.*, Minnesota CLEC Comments at 12.

alternatives that would have further limited the impact on small entities across-the-board while remaining consistent with Congress' pro-competitive objectives set out in the 1996 Act.

128. Report to Congress: The Commission will send a copy of the *CLEC Access Charge Reform Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this *CLEC Access Charge Reform Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *CLEC Access Charge Reform Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

### C. Initial Regulatory Flexibility Analysis

129. As required by the Regulatory Flexibility Act (RFA),[225] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *CLEC Access Order and Further Notice* (Further Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on this Notice, which are set out in Section VI of this Order. The Commission will send a copy of this Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[226] In addition, this Notice and IRFA (or summaries thereof) will be published in the Federal Register.[227]

#### 1. Need for, and Objectives of, the Proposed Action

130. In this *CLEC Access Order and Further Notice*, the Commission sets a benchmark for CLEC interstate switched access services that declines over time to the competing ILEC rate.[228] In the Further Notice, the Commission seeks comment on a proposal offered by AT&T to move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and to mandatorily detariff CLEC interstate access rates for such 8YY traffic above that point.[229] The Commission seeks comment on the nature and extent of the problem alleged by AT&T and on various means of addressing CLEC 8YY access service rates. Through the Further Notice, the Commission seeks to ensure that CLEC rates for 8YY access services are just and reasonable.

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[225] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[226] *See* 5 U.S.C. § 603(a).

[227] *See id.*

[228] *See supra* paragraphs 35 - 44 (discussing tariff benchmark mechanism).

[229] *See* AT&T March 29, 2001 letter at 1-2.

### 2. Legal Basis

131. The legal basis for the action as proposed for this rulemaking is contained in sections 1-5, 201-205, 208, 251-271, 403, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 208, 251-271, 403, 502, and 503.

### 3. Description and Estimate of the Number of Small Entities to Which the Proposed Action May Apply

132. We discuss above at paragraphs 115 to 116 the small entities to which this proposed action may apply. We incorporate that discussion here by reference.

### 4. Description of Proposed Reporting, Recordkeeping, and Other Compliance Requirements

133. In the *CLEC Access Order*, the Commission sets a benchmark for CLEC interstate switched access services that declines over time to the competing ILEC rate. Through the Further Notice, the Commission seeks comment on whether it should move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and mandatorily detariff CLEC interstate access rates for such 8YY access services above that point. Adopting this proposal may require CLECs to refile tariffs with the Commission or to negotiate contracts with IXCs, rather than filing tariffs.

### 5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

134. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[230]

135. As mentioned above, through the Further Notice, the Commission seeks to ensure that CLEC rates for 8YY access services are just and reasonable. Our proposals may affect CLECs, by altering the rates that they may tariff for 8YY access services. At the same time, our proposals might affect indirectly IXCs that must pay access charges for 8YY traffic. Because there are both small entity IXCs and small entity CLECs – with conflicting interests in this proceeding -- we expect that small entities may be affected by any approach that we adopt. We seek an approach that both reduces opportunities for regulatory arbitrage and minimizes the burdens placed on carriers.

136. Among the alternatives proposed, the Commission seeks comment whether it should move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and mandatorily detariff CLEC interstate access rates for such 8YY access services above

[230] 5 U.S.C. § 603(c).

that point. The Commission seeks comment, to the extent that it finds that a separate benchmark is appropriate for 8YY access rates, on whether it should instead impose such a limitation only on those CLECs that offer revenue-sharing agreements to their end users or only on those CLECs that do not offer local exchange services in addition to their 8YY access services. Alternatively, the Commission seeks comment on whether the Commission should take no additional action and whether IXCs should be left to address specific instances of abuse directly with the relevant CLEC, with the aid of the Commission's complaint process where appropriate.

137. We also seek comment on whether, if we adopt a different benchmark for 8YY access services, there are any different tariff filing requirements or timetables that we might adopt to account for the resources available to small entities.[231] We ask commenters to indicate whether and how such provisions would be consistent with our goals in this proceeding, including our obligation to ensure just and reasonable rates for interstate access services.

#### 6. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

138. None.

### D. Comment Filing Procedures

139. Pursuant to sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments within 30 days after publication in the Federal Register, and reply comments within 60 days after publication in the Federal Register. All filings should refer to CC Docket No. 96-262. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[232] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, CC Docket No. 96-262. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to <ecfs@fcc.gov>, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

140. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, Room TW-B204, 445 12th Street, S.W., Washington, D.C. 20554. Regardless of whether parties choose to file electronically or by paper, parties should also serve: (1) Jane Jackson, Common Carrier Bureau, 445 12th Street, S.W., Room 5-A225, Washington, D.C. 20554; and (2) the Commission's copy contractor, International Transcription Service, Inc. (ITS), 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 857-3800, with copies of any documents filed in this proceeding.

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[231] *See supra* paragraphs 98 - 104.

[232] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

141. Parties that choose to file by paper should also submit their comments on diskette to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. These submissions should be on a 3.5-inch diskette formatted in a Windows-compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, CC Docket No. 96-262), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy—Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file.

142. Comments and reply comments must comply with section 1.49 and all other applicable sections of the Commission's rules.[233] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments.

143. That this proceeding will continue to be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206. This will provide an opportunity for all interested parties to receive notice of the various issues raised in *ex parte* presentations made to the Commission in this proceeding; it will also allow interested parties to file responses or rebuttals to proposals made on the record in this proceeding. We find that it is in the public interest to continue this proceeding's designation as "permit-but-disclose."

144. Alternative formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 voice, (202) 418-7365 TTY, or <bmillin@fcc.gov>. This further notice of proposed rulemaking can also be downloaded in Microsoft Word and ASCII formats at <http://www.fcc.gov/ccb/cpd>.

## VII. ORDERING CLAUSES

145. Accordingly, IT IS ORDERED that, pursuant to sections 1-5, 201-205, 303(r), 403, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 303(r), 403, 502, and 503, this REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, with all attachments, including revisions to Part 61 of the Commission's rules, 47 C.F.R Part 61, is hereby ADOPTED.

146. IT IS FURTHER ORDERED that the rule revisions adopted in this Order SHALL BECOME EFFECTIVE upon approval by OMB of the modified information collection requirements adopted herein, but no sooner than thirty days after publication in the Federal

[233] *See* 47 C.F.R. § 1.49.

Register. The Commission shall place a notice in the Federal Register announcing the effective date of the requirements and regulations adopted herein.

147. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this CLEC Access Charge Order and Further Notice, including the Final and Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

# APPENDIX A
## Parties Filing Pleadings

## I. *PRICING FLEXIBILITY ORDER & NOTICE*

### A. Comments

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. State of Alaska (Alaska)
3. Allegiance Telecom, Inc. (Allegiance)
4. ALLTEL Communications, Inc. (ALLTEL)
5. Association for Local Telecommunications Services (ALTS)
6. American Public Communications Council (APCC)
7. AT&T Corp. (AT&T)
8. Bell Atlantic Telephone Companies (Bell Atlantic)
9. BellSouth Corporation (BellSouth)
10. Cable & Wireless USA, Inc. (Cable & Wireless)
11. Competitive Communications Group (CCG)
12. Competitive Telecommunications Association (CTA)
13. CoreComm, Limited (CoreComm)
14. Cox Communications, Inc. (Cox)
15. CTSI, Inc. (CTSI)
16. Focal Communications Corporation, Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions (Focal/Hyperion)
17. General Services Administration (GSA)
18. GTE Service Corporation (GTE)
19. State of Hawaii (Hawaii)
20. MCI WorldCom, Inc. (WorldCom)
21. McLeodUSA Telecommunications Services, Inc. (McLeodUSA)
22. MediaOne Group, Inc. (MediaOne) **(ex parte/late filing)**
23. MGC Communications, Inc. (MGC)
24. Minnesota CLEC Consortium
25. National Rural Telecom Association (NRTA)
26. National Telephone Cooperative Association (NTCA)
27. New York Department of Public Service (NYDPS)
28. Organization for the Promotion and Advancement of Small Telecommunications Cos. (OPASTCO)
29. Ranier Cable, Inc. (RCI)
30. RCN Telecom Services, Inc. (RCN)
31. Rural Independent Competitive Alliance (RICA)
32. SBC Communications, Inc. (SBC)
33. Sprint Corporation (Sprint)
34. Telecommunications Resellers Association (TRA)
35. Teligent, Inc. (Teligent)
36. Time Warner Telecom (Time Warner)
37. Total Telecommunications Services (TTS)
38. U S West, Inc. (US West)

39. United States Telephone Association (USTA)
40. Winstar Communications, Inc. (Winstar)
41. Public Service Commission of Wisconsin (Wisconsin PSC)

### B. Reply Comments

1. Allegiance
2. ALTS
3. Ad Hoc
4. AT&T
5. Bell Atlantic
6. BellSouth
7. CTSI, Inc.
8. State of Florida Public Service Commission (Fla. PSC)
9. Focal/Hyperion
10. GVNW Consulting, Inc. (GVNW)
11. GSA
12. GTE
13. ITCs, Inc. (ITCs)
14. WorldCom
15. Minnesota CLEC Consortium
16. MGC
17. RICA
18. SBC
19. Sprint
20. Time Warner
21. TRA
22. USTA
23. US West

## II. *EMERGENCY PETITION PUBLIC NOTICE*

### A. Comments

1. Allegiance **(ex parte/late filing)**
2. Association of Communications Enterprises (ASCENT)
3. AT&T
4. Buckeye Telesystem, Inc. (Buckeye)
5. Haxtun Telephone Company (Haxtun)
6. Montana Telecommunications Association (MTA)
7. NTCA
8. Sprint
9. Time Warner
10. TTS
11. U S West
12. USTA
13. WorldCom

### B. Reply Comments

1. Allegiance
2. ASCENT
3. AT&T
4. Minnesota CLEC Consortium
5. Sprint
6. RICA
7. USTA

## III. *MANDATORY DETARIFFING PUBLIC NOTICE*

### A. Comments

1. Ad Hoc
2. Allegiance
3. ASCENT
4. ALTS
5. AT&T
6. CTSI, RCN Telecom Services, Inc. and Telergy, Inc. (CTSI Joint Commenters)
7. e.spire Communications, Fairpoint Communications Solutions Corp., Intermedia Communications Inc., Newsouth Communications Corp., Nextlink Communications, Inc. and Talk.com, Inc. (collectively Joint CLEC Commenters)
8. Fairpoint Communications Solutions Corp. (Fairpoint)
9. Focal Communications Corporation (Focal)
10. GSA
11. Global Crossing North America, Inc. (Global Crossing)
12. MGC Communications, Inc. d/b/a Mpower Communications Corp., ITC^Deltacom, Inc. and Broadstreet Communications, Inc. (MGC Joint Commenters)
13. Minnesota CLEC Consortium
14. Prism Communications Services, Inc. (Prism)
15. RICA
16. Sprint
17. Teligent
18. Time Warner
19. Verizon Companies (Verizon)
20. Winstar
21. WorldCom
22. Z-Tel Communications, Inc. (Z-Tel)

### B. Reply Comments

1. Ad Hoc
2. Allegiance

3. ALTS
4. ASCENT
5. AT&T
6. Cable & Wireless
7. Centennial Communications Corp. (Centennial)
8. Joint CTSI Commenters
9. Joint CLEC Commenters
10. Focal
11. GSA
12. MGC
13. Minnesota CLEC Consortium
14. RICA
15. Sprint
16. U.S. TelePacific Corp. (US TelePacific)
17. WorldCom

## IV. *SAFE HARBOR PUBLIC NOTICE*

### A. Comments

1. ALTS
2. ASCENT
3. AT&T
4. BayRing Communications and Lightship Telecom, LLC (collectively BayRing)
5. CTSI, Inc. and Madison River Communications
6. Eschelon Telecom, Inc. (Eschelon)
7. e.spire Communications, Inc., KMC Telecom, Inc., Talk.com Holding Corp. and XO Communications, Inc.
8. FairPoint Communications Solutions Corp. (FairPoint)
9. Focal Communicaitons Corporation, RCN Telecom Services, Inc. and Winstar Communications, Inc.
10. McLeodUSA Telecommunications Services, Inc.
11. Minnesota CLEC Consortium
12. NTCA
13. OPASTCO
14. RICA
15. Sprint
16. TDS Metrocom, Inc. (TDS)
17. USTA
18. WorldCom
19. Z-Tel

### B. Reply Comments

1. AT&T
2. Ad Hoc

within the six months preceding [insert date 30 days after publication in the Federal Register].

(c) From [insert date 30 days after publication in the Federal Register] until [insert date one year and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.025 per minute. From [insert date one year and 30 days after publication in the Federal Register] until [insert date two years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.018 per minute. From [insert date two years and 30 days after publication in the Federal Register] until [insert date three years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.012 per minute. After [insert date three years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be the rate charged for similar services by the competing ILEC, *provided, however*, that the benchmark rate for a CLEC's interstate switched exchange access services will not move to bill-and-keep, if at all, until [insert date four years and 30 days after publication in the Federal Register].

(d) Notwithstanding paragraphs (b) and (c) hereof, in the event that, after [insert date 30 days after publication in the Federal Register], a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its interstate exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption: Notwithstanding paragraphs (b) through (c) hereof, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching and the transport interconnection charge. If the competing ILEC is subject to the Commission's *CALLS Order*, 65 Fed. Reg. 38684 (June 21, 2000), this rate shall be reduced by the NECA tariff's carrier common line charge.

## APPENDIX B – Final Rules

## AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Part 61, Subpart C, of Title 47 of the Code of Federal Regulations (C.F.R.) is amended by adding section 61.26 as follows:

**61.26 Tariffing of competitive interstate switched exchange access services.**

(a) *Definitions*. For purposes of this paragraph 61.26, the following definitions shall apply:

(1) "CLEC" shall mean a provider of interstate exchange access services that does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. § 251(h).

(2) "Competing ILEC" shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h), that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC.

(3) "Interstate switched exchange access services" shall include the functional equivalent of the ILEC interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.

(4) "Non-rural ILEC" shall mean an incumbent local exchange carrier that is not a "rural telephone company" under 47 U.S.C. § 153(37).

(5) The "rate" for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) "Rural CLEC" shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c) and (e), a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) or

(ii) The lowest rate that the CLEC has tariffed for its interstate exchange access services,

3. BayRing
4. CTSI, Inc.
5. Cox
6. e.spire Communications, Inc., KMC Telecom, Inc., Talk.com Holding Corp. and XO Communications, Inc.
7. Eschelon
8. FairPoint
9. Focal and Winstar
10. Minnesota CLEC Consortium
11. RICA
12. Sprint
13. Z-Tel

not strong enough to furnish any real confident guidance because of the cancellation issue.

ATTORNEY BENDERNAGEL: Correct.

THE COURT: And there are some AT&T claims in Category 4, and there you say those should go to the Commission because they all rest on the cancellation question.

ATTORNEY BENDERNAGEL: Well, I don't want you to send over the -- we are not in favor of you sending the claims to the FCC under constructive ordering.

Our basic position is we want the legal issue of whether, in fact, we have the right to terminate, or whether we have the right, in fact, to say, "We are not accepting your service," or "We are declining your service," whether we have that right as a legal matter under these things. We would like that legal question certified over.

I think in terms of the Court's competence and ability to deal with the question of whether, in fact, it's determined -- here is what happens: I mean, if they come back and they say, "AT&T, you don't have that right," we are finished here. I mean, it's over to the 208 rate case, and there is nothing to decide here.

If they come back and they say "Oh, you do have that right," we are not home free at that juncture,